VOLUNTARY ASSUMPTION OF RISK.

I.

THE maxim *volenti non fit injuria* as expressing the principle that one who has voluntarily encountered a known danger cannot recover from the creator thereof, has of late years been much discussed in relation to a particular class of cases, those brought by workmen against their employers to recover for injuries received in the course of their employment. Neither the maxim nor this principle, which among other things it expresses, is confined to this particular class of cases, nor does it state any isolated or anomalous doctrine. It is not in any way founded upon anything peculiar to the relation of master and servant, nor is it based upon the contractual nature of the relation. It does not result from an implied term in a contract creating the relation; it applies equally to any relation voluntarily assumed — contractual or not. The maxim *volenti non fit injuria* is a terse expression of the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure. Each individual is left free to work out his own destinies; he must not be interfered with from without, but in the absence of such interference he is held competent to protect himself. While therefore protecting him from external violence, from imposition and from coercion, the common law does not assume to protect him from the effects of his own personality and from the consequences of his voluntary actions or of his careless misconduct.

The doctrine of the so-called voluntary assumption of known risks is but one of the expressions of this fundamental idea; other exhibitions of it, differing only with the conditions to which the conception is applied, are the defenses of consent and of contributory negligence. None of these is identical with any other, none is derived from the other, all are derivatives from a common source.

In the law of torts, at least, the idea of any obligation to protect others was abnormal. In time it came to be recognized that such duties might be forced upon persons who should engage in certain public pursuits. Upon carriers, innkeepers, and those engaged in

the many trades and callings which mediæval society regarded as services essential to the public well-being, was laid, as an inseparable incident, the duty not merely of refraining from injurious misconduct, from violence and fraud, but in addition the duty of the positive performance of careful service. In time many obligations of a somewhat similar sort were imposed upon certain classes of often occurring relation, thus eating into the original conception that a man had no cause of complaint if violence were not done to him and if he were not misled to his harm. But even to these new relation obligations the individualistic tendency of the law lent its color. When the obligations inherent in the various relations in which in civilized society the citizens are placed to one another came to be formulated, it was almost universally held that fair play was all that was required from one who was dealing without recompense with another. A gratuitous bailee owed to his bailor merely the duty of good faith to treat his bailor's goods as his own.[1]

When one lent to another a chattel, there was no duty save that of full disclosure of those defects which were not obvious to the borrower, but were known to the lender.[2] Beyond that the borrower, if he chose to use another man's property, must protect himself. If inspection were required to insure the safe use of the thing borrowed, he, and not the lender, must make it. So too, where an owner of land permitted others to come upon it, or even where he invited them to come,[3] but for a purpose not connected with his business use of his premises, he was held bound to disclose any known defects not obvious to his guest, but to do no more. And when he held open his land as a place to which his business patrons or clients might come for his, the owner's, purposes,[4] even then, while he was held bound to know of defects which a reasonable inspection would discover, having discovered them, he fulfilled his obligation, if, not choosing to repair the defect, he gave to his customers or clients notice of its existence.[5]

Throughout it is seen that the obligation to do more than afford

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[1] While this was later modified to require the bailee to take such care as a man should of his own, it still continued to express the idea of fair play, an average fair play, — the good faith of the good citizen.

[2] McCarthy *v.* Young, 6 H. & N. 329.

[3] Southcote *v.* Stanly, 1 H. & N. 247.

[4] Indermaur *v.* Dames, L. R. 1 C. P. 274, per Willes, J.

[5] See Kelley, C. B., in Indermaur *v.* Dames, L. R. 2 C. P. 311.

others the opportunity to protect themselves is anomalous and exceptional.

Where, therefore, one voluntarily acts or enters into a relation contractual or otherwise with another, his knowledge of the risks inherent to his action or to the relation created, disproves the existence of any duty on the part of the creator of the danger to remove it, just as consent to suffer violence destroys the wrongfulness of its application. Neither knowledge of a danger voluntarily encountered nor consent is a defense which, while admitting the breach of a duty, justifies or excuses it, or which debars the plaintiff from recovering because himself a wrongdoer. Such is the view of Lord Justice Bowen in Thomas *v.* Quartermaine.[1]

Another view is often expressed, that it is a defense admitting the defendant's duty and its breach, but alleging that the plaintiff, having voluntarily encountered the danger, has impliedly consented or agreed to assume the risk.[2] This attitude is most often assumed

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[1] 18 Q. B. D. 685. Knowlton, J., in Fitzgerald *v.* Conn. R. Paper Co., 155 Mass. 155, while expressing concurrence with this view, shows a confused leaning to other conceptions. At p. 159 he says: "The plaintiff's conduct in voluntarily exposing himself is an act which as between the parties makes the defendant's act no longer the proximate cause of the injury." Now legal proximity may be important in two ways: it may determine the defendant's duty to refrain from some particular act, or the extent of his liability for the consequences of an admitted wrong. See 40 Am. L. Reg., N. S., 79 and 148. If the defendant could not foresee that the plaintiff would probably expose himself to the danger, the defendant as to him is guilty of no wrong in creating it; if, though his act was wrongful, the plaintiff's exposure was not the natural consequence of it, the defendant is not liable for the ensuing injury. Now, while no one is legally bound to anticipate that others will officiously intermeddle or act wrongfully or recklessly, and so is not responsible for what they may do with opportunities or under temptations of the defendant's creation, where such other has the right or is bound by a legal or social duty to act as he does, or if he acts under the defendant's orders and for his benefit and just as he intended (the actor's sole freedom of volition being a legal right to refuse obedience and leave an employment in the course of which he is bound to obey), such action is more than natural and probable, it is actually induced and intended. Again, to say that an act is the proximate cause of an injury only as between the parties is to add a new element of confusion to a subject already difficult. If the act and the consequences are the same, the legal proximity of the one to the other, depending as it does on the foresight of the normal man or on the course of nature, cannot be affected by the personality of the plaintiff, who, it is true, may for other reasons be barred by it. It is a confusing misuse of the word to say that if a servant voluntarily driving a known skittish horse is injured together with a stranger in the ensuing runaway, the master's act in supplying the horse is a proximate cause of the stranger's injuries but not of the servant's. The same confusion of thought beclouds the subject of contributory negligence. See Bowen, L. J., in Thomas *v.* Quartermaine, 18 Q. B. D. 685. See an admirable treatise on Contributory Negligence by Charles H. Burr, Esq., of the Philadelphia Bar.

[2] This is probably in reality the attitude of Lord Esher in Yarmouth *v.* France,

where the relation is one created by contract and the assumption of risk is considered as an implied term of the contract creating the relation. Where there is a statute creating a duty or relation so far of right that an obligation is imposed upon the defendant that the plaintiff may safely enter or remain in it, this is no doubt the aspect in which the maxim presents itself for application. In such case mere knowledge is not enough; a true unconstrained consent, with full knowledge not merely of the danger but of the right to protection as well, is required to waive liability for the breach of an existing duty.

The defense of contributory negligence is quite distinct.[1] Negligence involves the idea of misconduct, a failure to measure up to the standard of that ideal personage the normal social man; assumption of risk does not. A risk while obvious may not be so imminently dangerous that a prudent man would necessarily avoid it, yet if it shall be freely encountered it will in general be held to be so far assumed that no recovery for consequent injury is possible. Voluntary conscious action may be negligent[2] if the known

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19 Q. B. D. 647, and would naturally follow from his position that, under the Employers' Liability Act of 1880, a duty was created to see that the plant was in safe condition. His language is: "I think there is a duty; though I agree that there is no actionable breach of that duty if the person injured, knowing and appreciating the danger, voluntarily encounters it." Now this indicates a duty owed to plaintiff the breach of which is excused by his consent thereto, — not the idea of a duty in the air, a duty to others who may be ignorant, but not to the plaintiff who knows. Such a conception as the latter is utterly foreign to the remedial view point of the common law which disregards as quite immaterial any duty not owed to the plaintiff. Knowlton, J., in Fitzgerald *v.* Conn. R. Paper Co., 155 Mass. 155, ascribes to Lord Esher the view that there is a duty of imperfect obligation, performance of which the law will not enforce. It is fair to presume that Lord Esher did not intend to announce a doctrine so foreign to the whole spirit of the common law.

[1] Bowen, L. J., in Thomas *v.* Quartermaine, 18 Q. B. D. 485. This is particularly noticeable in those jurisdictions where special verdicts are rendered. A finding that the plaintiff has not been guilty of contributory negligence does not in any way preclude inquiry as to whether he, knowing the risk, has voluntarily encountered it and so cannot recover, though the two are often confused. This has been especially so until late years. In Pennsylvania this confusion is particularly marked; in all the cases, save perhaps the latest, the voluntary encountering of a known risk is spoken of as contributory negligence (see Patterson *v.* R. R., 76 Pa. St. 385), thus unnecessarily branding as culpable the innocent victim who sacrifices himself to the necessities of his family.

[2] In fact the two cases, Cruden *v.* Fentham, 2 Esp. 685 (1798) and Clay *v.* Wood, 5 Esp. 44 (1803), which preceded Butterfield *v.* Forrester, 11 East 60 (1809), were clearly cases where the plaintiffs voluntarily put themselves in positions of known danger to insist upon their right of way under the rules of the road. In fact, Lord Ellenborough in Butterfield *v.* Forrester says, "a party is not to cast himself upon an obstruction made by the fault of another and avail himself of it, if he do not himself use ordinary

danger be great and imminent, but it is not negligent because voluntary. By contributory negligence a plaintiff is barred from recovery by his own misconduct, though the defendant has been guilty of an act admittedly wrongful as to him. Voluntary subjection to a known risk negatives the existence of any duty on the defendant's part by the breach of which he could be a wrongdoer.

It is essential that the two ideas should be kept quite distinct. For just as there may be voluntary subjection without negligence, there may be negligence though the subjection is not voluntary. In such case the danger may be so great and imminent that no prudent man may face it, even to assert his legal rights or perform his legal or social duties, — no man of course being allowed to insist on his extreme rights in the face of certain injury. Or the plaintiff who may be entitled to run a known and appreciated risk may have failed to take those additional precautions which the known risks of his situation require. In either case, though for any reason the doctrine of voluntary (so-called) assumption of risk may not apply, the plaintiff will undoubtedly be barred by his contributory negligence.

There are, however, certain broad classes of cases in which the voluntary encountering of a perfectly well-known and appreciated danger has been held not to involve an assumption of the risk of the resultant injury. Two are stated by Bowen, L. J., as follows: [1] "The injured person may have a statutory right to protection, or again, the plaintiff may have a common right or individual right at law to find these particular premises (or appliances) free from danger, as in the case of lands on which a market or fair has been held."

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caution to be in the right." The defense of contributory negligence as developed in the line of decision following that case is perhaps the highest expression of the individualism of the law. It requires every one not merely to assume the risks which to his knowledge attend his voluntary acts, but also to bear all those injuries which he may receive through his own misconduct, whether mere unthinking careless acts and omissions or conscious reckless exposure to unwarranted risk. He cannot throw the burden of his own personal neglect or rashness on the shoulders of another whose wrong has contributed to cause the injury. It seems quite unnecessary to resort to any other basis for this defense than the general individualistic tendency of the law. It is quite clear that it cannot rest on the application of the general doctrine of proximate cause, and to say that the plaintiff is bound as a joint wrongdoer is open to the objection taken by William Schofield, Esq., in 3 HARV. L. REV. 266, that the duty of self-preservation is at best a moral and not a legal obligation, and that therefore the plaintiff is not legally a wrongdoer. See Saylor *v.* Parsons, 98 N. W. Rep. 500.

[1] In Thomas *v.* Quartermaine, 18 Q. B. D. 485.

In addition to the illustration given by Bowen, L. J., of a market or fair,[1] other common instances of persons having a common or individual right to find the premises free from danger may be grouped into the following classes:

1st. Where a traveler uses a highway known to be somewhat dangerous, there being no other convenient safer way whereby he may reach his destination.[2]

2d. Where a tenant of offices or a flat, the approaches, stairs, halls, elevators, etc., of which remain under the control of the landlord, together with the duty of safe maintenance, knowing that this duty has not been performed and that the approaches have been allowed to become unsafe, remains in possession and does not immediately throw up his lease.[3]

This principle is equally so where one not the tenant but entitled in his right to use the premises continues to do so with like knowledge.[4]

3d. Where a shipper of goods or an intending passenger to whom the carrier is bound to furnish carriage and access and egress to and from the premises for the purpose, knowing of some slight imperfection in the appliances of carriage or in the approaches to the stations, persists in having his goods carried or who uses such defective means of access or egress.[5]

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[1] Lax *v.* Mayor of Darlington, 5 Ex. D. 28.

[2] Mellor *v.* Bridgeport, 191 Pa. St. 564; Pomeroy *v.* Westfield, 154 Mass. 462; Norwood *v.* Smeuville, 159 Mass. 105; Harris *v.* Clinton, 64 Mich. 447; Musselman *v.* Borough, 202 Pa. St. 490.

[3] Looney *v.* McClain, 129 Mass. 529; Dollard *v.* Roberts, 130 N Y. 269. See remarks of Mathew, L. J., discussing Cavilier *v.* Pope, [1905] 2 K. B. 757, p. 767. The case was decided against the wife of a tenant on the ground that the landlord not having control owed no duty to repair save by a contract to which she was not party. Ide *v.* Mitchell, 5 N. Y. App. Div. 208; Watkins *v.* Goodall, 138 Mass. 533; Guda *v.* Glucose Co., 154 N. Y. 474. In Payne *v.* Irwin, 144 Ill. 482, the tenant apparently had actual physical control, and in fact it was questionable whether the defect was not due to his own act.

[4] Looney *v.* McClain, 129 Mass. 529; Marwedel *v.* Cook, 154 Mass. 235.

[5] Osborne *v.* R. R., 21 Q. B. D. 220, especially the opinion of Grantham, J. See however *contra*, Goldstein *v.* R. R., 46 Wis. 404, a case which perhaps may be explained, as may be Miner *v.* R. R., 153 Mass. 398, on the ground that the plaintiff had other though less convenient access, or that by waiting the obstruction not in its nature permanent might have been removed. See also *contra*, dictum of Parke, B., in Priestly *v.* Fowler, 3 M. & W. 1. Where a passenger's carriage comes to a stop beyond the platform of the station which is his destination, he may alight at such point even if the attempt is attended with some risk if he "is satisfied that the train is going on and there is no other alternative but to get out." Cockburn, C. J. He need not sit still and be carried to the next station. Rose *v.* R. R., 2 Ex. D. 248; Robson *v.* R. R.,

4th. Where a landowner's access to his premises having been impeded or rendered dangerous by the defendant's wrongful act, he braves the danger to raise the siege.[1]

5th. Where by the defendant's wrongful misconduct the plaintiff is endangered in the performance of work not upon the defendant's premises and at a point where the plaintiff has a right to be irrespective of the defendant's consent.[2]

6th. Where one moves to a nuisance, or knowing of a wrongful act by an adjacent owner continues to use his land for the purpose for which it is naturally adapted, but which through the defendant's misconduct involves a risk of injury to his person or property.[3]

To these may be added the class of cases where the plaintiff has under an exigency caused by the defendant's wrongful misconduct acted consciously and voluntarily in a way which has subjected him to known danger, but where he has so acted in the protection of some legal right or in the performance of some legal or social duty, as where the plaintiff has risked his life to save that of another imperilled by the defendant's wrongdoing, in the performance of his duty,[4] or in obedience to the dictates of his manhood,[5] whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no duty save that of humanity.[6] Similarly, the

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L. R. 10 Q. B. 271, 2 Q. B. D. 85, though Bramwell, B., in Siner *v.* R. R., L. R. 3 Exch. 150, thought he should go on to the next station and then sue the company. In Siner's case there was another alternative — she might have called upon the guard to back the train.

[1] Clayards *v.* Dethick, 12 Q. B. D. 439, where a livery stable man was held entitled to lead his horse over a trench wrongfully dug in front of his stable. Hickey *v.* Waltham, 159 Mass. 460. Holmes, J., decided on facts practically the same as in Clayards *v.* Dethick, that it was for the jury to say whether the plaintiff's conduct was a bar to her recovery (as being a voluntary assumption of the risk of a known danger) and said: "One fact to be considered was the strait that she had been placed in by defendant," "practically besieged and walled in," and also that another question for their consideration was whether she had fully appreciated the risks of the condition of the ditch and pile of dirt, which had been changed since she had last observed them.

[2] Thornsville *v.* Handyside, 20 Q B. D. 359.

[3] Kellogg *v.* R. R., 26 Wis. 223; Donovan *v.* R. R., 98 Miss. 147. See however Anthony *v.* Krum, 115 Pa. St. 431.

[4] 88 N. Y. App. Div. 389, a policeman stopping a runaway, or an engineer staying upon his engine in the hope of averting a collision, as in Cotrill *v.* R. R., 47 Wis. 634.

[5] Eckert *v.* R. R., 43 N. Y. 502.

[6] As in Corbin *v.* City, 195 Pa. St. 461, the decision in Eckert *v.* R. R., while often

principle that one who to save his own property runs a risk which a prudent man would under the circumstances encounter is not to be taken to have assumed the risk thereof,[1] was extended, in Lining *v.* R. R.,[2] to cover a case where the plaintiff voluntarily exposed himself to a risk in trying to remove the horse of a friend with whom he boarded, from a stable threatened by a prairie fire which had been started by the defendant's negligence.

In all such cases the plaintiff's person or property or the person or property of another must be threatened with injury as the result of some wrongful misconduct by the defendant.[3]

It would seem that in reality these cases do not form a definite distinct class from the second class of cases mentioned by Bowen, L. J.; in fact they are all referable to the same general principle, that one who has the legal right or legal or social duty to act as he has done under the conditions created by the defendant's wrong does not act voluntarily, his action is caused by the coercion of the circumstances which the defendant's wrong has created. In all the plaintiff had a right to do what he did or be where he was injured which was in no way dependent upon the mere consent of the defendant, a consent which he was free to give or withhold.

In all there has been a wrong done by the defendant. An admitted duty has been violated; either a statutory requirement has been neglected, a legal right impeded and hampered, or some wrong done threatening the plaintiff's person or property, or the person or property of some other to whom he owes some duty, either legal or social. In none is it necessary to rely upon a duty to protect others from the consequences of their own conscious,

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criticised, has been generally followed, and no contrary case has ever been decided. In England, where the precise question has never arisen, it has been spoken of with approval by Mr. Beven and by Sir Frederick Pollock.

[1] Rexler *v.* Starin, 73 N. Y. 600. The owner of a boat went on it to prevent an imminent collision with the defendant's vessel. While the case is treated as one of contributory negligence, it was held that "he had the right to do so, almost a duty." See also Wasmer *v.* R. R., 80 N. Y. 212, where plaintiff ran in front of a moving train in an attempt to save his horse frightened by defendant's negligence.

[2] 91 Ia. 246. See however *contra*, Cook *v.* Johnson, 58 Mich. 437, where a wife who entered a stable in full blaze to save her husband's horse was held to have acted voluntarily and to have taken the risk upon herself.

[3] Hiatt *v.* R R., 17 Ind. 102. See an extraordinary case in which it was held that one taking a risk to save the life of the defendant who had by his own misconduct imperilled himself could not recover for the reason that the defendant was guilty of no actionable negligence as towards himself; no man owing to himself any legal duty of care. Saylor *v.* Parsons, 98 N. W. Rep. 500 (Iowa).

intended acts. In such cases, therefore, something more is required than the plaintiff's mere knowledge of danger; he must encounter it under such circumstances as show either that he was negligent in so doing, because the danger was so great and imminent that no prudent man would face it even to protect himself or others, or to assert his rights either at common law or of statutory protection; or else he must have encountered it under such circumstances as to indicate that he voluntarily, willingly, and affirmatively assumed the risk, that he recognized the danger, knew his right to be protected from it, but still chose to encounter it, not because of the pressure or coercion put upon him by the defendant's wrongdoing, but for some private reason of his own.

Once find the existence of a duty[1] to avoid the creation of a danger and the question of the coercion of the plaintiff's will forcing him to encounter it becomes all important. The very term "voluntary assumption of risk" involves freedom of volition. The very individualism of the common law, which requires that each man shall bear the consequences of his own voluntary conduct, of necessity requires that it shall not impose an intolerable subjection to fortuitous advantages of superior physical, social, and economic position; that such advantages shall not be abused to obtain the mere form of consent while the substance of real volition is absent. There can be no real volition where there is no choice between at least two alternatives, neither of which involves the abandonment of a legal right or the relinquishment of the performance of a duty. While the common law makes no pretence of being a social reformer, and does not profess to reduce all persons to an absolutely equal position by eliminating all natural advantages, but rather, recognizing society as it is, considers social inequalities as the natural inevitable tactical advantages of those lucky enough to possess them, it does prohibit their misuse, while permitting their use within fair limits.

However, from time to time, certain classes of persons were recognized, either by the common law or by Acts of Parliament,[2]

[1] As Cockburn, C. J., says in Clark *v.* Holmes, 7 H. & N. 907, "It is unimportant whether a duty exists by virtue of a statute or at common law." If the duty exists, it can only be waived by an unconstrained voluntary consent (express or necessarily implied from the circumstances) to take all the risks. The difficulty is in the absence of a statute in discovering any duty at common law, save that of fair disclosure of latent dangers. See Bramwell, B., Britton *v.* R. R., L. R. 7 Exch. 130, 138.

[2] Sometimes by the judicial interpretation of such acts.

as persons whose position rendered it impossible for them to contract upon anything approaching a fair footing of equality. Now, this might be either because of their lack of ability to appreciate the dangers inherent in the relation created or the consequences of their voluntary actions or contracts, as in the case of infants or persons of imperfect understanding, or because of their economic necessities which compelled them, whether or no, to face perils or assume burdens which they fully appreciated; so courts of equity have relieved expectant heirs from unconscionable bargains and so the courts of the United States have done what the Railway and Canal Act of 1834 has, as judicially interpreted, done in England, and have relieved shippers and passengers from an expressed consent to waive the carrier's liability for his or his servant's negligences, imposed as a condition to affording carriage to them. Now, while the reason often given in the American cases[1] is that it is against public policy to allow validity to such consent because it removes the incentive of care necessary for the protection of the lives and property carried, it will be noticed that this public policy does not extend to other voluntary relations where care is required to protect the life and property of one of the parties. As much danger and more is threatened the employee as the passenger; and yet from the mere fact of entering the service the former is held to assume all the risk while the latter is not bound by his consent even when expressly given. Care for human life alone will therefore not account for the peculiar protection afforded passengers and shippers. From what then does it proceed? Evidently from the fact that as a class they are at the mercy of their carrier. Carriage of one's person and goods is, under modern conditions, a necessity. The carriers are usually railroads having a practical monopoly, and so able to dictate as a condition of carriage such terms as they please unless the courts interfere to restrain them from abusing their power. Then, too, the common carrier owes the duty of carriage. The relation is not, therefore, one in any true sense voluntary, the pure creature of the will of the parties; one has a right to enter into it, the other is bound to do so. So in construing the Act of 1834, the House of Lords held that the courts had the power to pronounce upon the reasonableness of all stipulation as to the terms of carriage:[2]

[1] Quinby *v.* Ry., 150 Mass. 365.

[2] Williams, J., in Peek *v.* R. R., 18 C. B. 805, affirmed in the House of Lords, 10 H. L. Cas. 473.

"Whereas the monopoly created by railways compels the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security that the courts shall see that the conditions be just and reasonable"; and as Crompton, J., said,[1] "The real question [in determining whether the conditions are reasonable] is whether the individual and the public are sufficiently protected from being unjustly dealt with by persons having the monopoly." "The mischief [which the act was intended to prevent] was in compelling people to enter into contracts [of exemption as condition of carriage] whether they willed it or not." Where the carriage is not as common carrier, but purely gratuitous, or the result of some private arrangement for peculiar privileges, there seems therefore no good reason why the carrier may not make what stipulations he please as to the condition on which he shall carry the passenger or goods.[2]

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[1] In Beal *v.* R. R., 3 H. & C. 587, quoted with approval by Blackburn, J., in Brown *v.* R. R., 8 App. Cas. 711.

[2] In Lockwood *v.* R. R., 17 Wall. (U. S.) 57, the Supreme Court of the United States base their decision that a railway cannot free itself either by general notice or special contract from liability to its passengers or shippers for injuries caused by its negligence, upon the unequal footing upon which customer and carrier stand. In B. & O. R. R. *v.* Voigt, 176 U. S. 498, it was held that the railway was not acting as a common carrier in transporting the cars of an express company under a special contract, and that a clause therein exempting the railway from liability was valid. The plaintiff, an express messenger, who had in his contract with his employer expressly exempted all carrying railways from liability, had no right to demand such transportation, the railway no duty to grant it; it was a matter of purely private arrangement, and the railway could annex what conditions it pleased to the special service afforded. So in Northern Pacific R. R. *v.* Adams, 192 U. S. 440, it was held that in affording free transportation the railway was not performing a duty as common carrier, but granting a privilege; the passenger was not exercising a right, but enjoying a gratuitous benefit. "He was not in the power of the company and obliged to accept its terms. They stood on a perfectly even footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted the privilege he cannot repudiate the conditions." Brewer, J. The English law is the same. McCawley *v.* Furness, L. R. 8 Q. B. 57; and the preponderance of decisions of the American state courts follows the federal cases, though there are conflicting decisions in some jurisdictions. See cases cited in R. R. *v.* Voigt, and R. R. *v.* Adams, *supra*. Where free passage is given as an incident to the paid transportation of freight, American courts have as a rule held that the carriage is not gratuitous and that a clause of exemption from liability is void. Lockwood *v.* R. R., *supra;* Henderson *v.* R. R., 51 Pa. St. 315; see, however, McCawley *v.* Furness, *supra, contra*. In Blank *v.* R. R., 182 Ill. 332, it was held that since a railroad was not acting as common carrier in transporting a Pullman car, a contract by a porter of the latter exempting the carrying road was therefore not against public policy. He was being carried by virtue of a merely private arrangement, as to which both parties had full latitude of contract.

These principles have been applied to the relation of master and servant. Under the first it is universally held that if the servant is of tender age, imperfect intelligence, or lack of experience, the master is bound to point out the dangers and risk which are known or should be known to him to be incident to the employment, and such servant is not put on notice of them because they would be obvious to an intelligent experienced adult. Under the second, it has been held that a seaman who continues to work with an appliance known by him to be dangerous does not assume the risk, because he cannot leave the ship and his officers have the power to force him to continue work with the appliances as they are,— he is thus coerced by their power over him, and his act is in no true sense voluntary.[1]

There is too, as naturally follows, a broad distinction between consent obtained by coercion applied by the person obtaining it and the coercion of extrinsic conditions in no wise caused by him who avails himself of it.[2] While no man could by imprisoning another obtain from him a binding contract in consideration of his release, there seems to be no doubt that a promise of reward to one who rescues another from such duress would be valid and binding. So the pressure of commercial or economic necessities in no wise caused by the wrongful act of him who seeks to profit by them, while it may make his action harsh and morally reprehensible, will not render his act in so utilizing his neighbor's distress for his own advantage legally wrongful.

There may be of course physical pressure so strong that the act ceases to be that of the person whose act it purports to be; such an act then becomes a mere nullity. It cannot bind the actor,

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[1] The cases of Eldredge *v.* Atlas Co., 134 N. Y. 187, and Thompson *v.* Herman, 47 Wis. 602, were cases where the defect was not obvious when the sailor signed on. If they had been, it would seem that its risk was assumed, or, to put it more accurately, the master in the absence of some special agreement owed the sailor no duty to repair conditions obvious when the sailor engaged to serve. There is no more compulsion on a sailor to sign than that upon a mechanic to take a job.

[2] In Harris *v.* Clinton, 64 Mich. 447, it was held that a plaintiff who attempted to cross a flooded unfenced causeway, it being his only way home, did not as against the township assume the risk; but the illness of the plaintiff's wife and his anxiety about her "could not be considered an element of proof to excuse him from incurring risks which he ought not otherwise to have taken." See an elaborate opinion by Holmes, J., in Fairbanks *v.* Snow, 145 Mass. 153, on the distinction between duress by parties to the action and strangers such as purchasers for value of negotiable paper. See also Alaska Co. *v.* Domenico, 117 Fed. Rep. 99, where the plaintiffs availed themselves of the defendants' economic necessities to force the rescission of a prior contract.

whether to him applying the coercion or to any one else. But this differs largely from the form of coercion discussed above. There is here a complete lack of all volition, not a mere coercion of the will. It is here that Lord Bramwell's conception of voluntary action is at fault. To him all acts are entirely voluntary where the actor is not physically constrained, — where his mind can command his body, where his muscles are free to answer to the dictates of his brain. In a long line of cases[1] he states this conception in his own singularly striking and forcible manner. To him there is no coercion save that which was recognized in that early era of the law when the only effective pressure was the constraint of physical force, of the power of feudal barons and their lesser imitators, who wrung from those who fell into their power grants by physical violence or imprisonment. He appears strangely unable to appreciate the true spirit of English freedom, — the peculiar tenacity of their privileges, that insistence upon the exercise of their legal rights even in the face of danger which has been the most marked influence in making them the free nation they are. Nothing could be more un-English than the conception that a right must be relinquished if it cannot be exercised with perfect safety, — that one who finds himself confronted with some slight risk[2] must relinquish his right and seek the aid of the courts to give him damages for its deprivation.

So it may be said that while from the beginning the law of torts prohibited external violence between strangers, and fraud and imposition between those dealing with one another, it left to all those who voluntarily entered into relations with one another the regulation of the amount of protection which should be accorded them, and in the absence of some bargain no duty of affirmative protective action was required. Soon, however, as has been seen, to certain trades and callings were annexed certain affirmative obligations of careful performance. In fact, very early it was recognized that to all gainful trades was attached a duty of competent workmanship therein,[3] and with the growth of new activities

[1] Siner *v.* R. R., L. R. 3 Exch. 150; Lax *v.* Darlington, 5 Ex. D. 28; Memberry *v.* R. R., 14 App. Cas. 179, and Smith *v.* Baker, 91 App. Cas. 325.

[2] If the risk be so great and imminent and out of proportion to the right asserted, so that a prudent man would not encounter it, even to vindicate his right to attempt to assert it would be contributory negligence; in fact, the earliest cases in which the doctrine of contributory negligence was foreshadowed were cases of this kind. No man, even an Englishman, may insist even on his rights in the face of certain injury.

[3] See 53 Am. L. Reg. 218–221.

the various relations resulting crystallized into definite classes with definite duties of varying sorts adhering to them. But the early conception that no affirmative duty was to be imposed save on a consideration moving to him on whom it was laid, though not necessarily from the beneficiary, remained in all its original vitality. And so in the absence of some particular benefit no duty was held to exist beyond that of personal good conduct, — no duty was recognized to answer that care be taken to secure the safety of others. Where then one entered into a voluntary relation with another, not for the particular benefit of such other and for a consideration paid to such other by some one, not necessarily the obligee, but either for his own benefit or the joint benefit of himself and such other, no duty was normally owed save that of full disclosure of the conditions under which the relation was to be constituted; at the most, and this only where there was joint benefit, there might be a duty to ascertain the true nature of the conditions imposed on him who, having the control of the premises or chattels to be used, had the ability to do so.

In a word, the only duty was not to seduce another into forming such a voluntary relation in reliance upon an appearance of safety known or which ought to be known to be deceptive. Beyond this, if any protection was desired the party must look to his ability to bargain for it. If he had more need of such relation than the other, he might be unable to obtain such protection by bargain. This, however, was his misfortune, not the other's fault. If the relation was purely voluntary; if it was one which neither party was legally bound to enter into; they might set what terms and conditions they pleased upon its creation. That the social or economic status of the parties gave one the power to make a harsh bargain did not concern the courts.

Coming now to the particular relation of master and servant, to which the maxim *volenti non fit injuria* is so constantly applied, a careful reading of Priestly *v.* Fowler [1] will show that Lord Abinger was not laying down any peculiar or anomalous doctrine applicable only to the particular relation,[2] but was applying to it

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[1] 3 M. & W. 1 (1837). The first case in which the question of a master's duties to his servant was presented to an English court for decision.

[2] In Southcote *v.* Stanley, 1 H. & N. 247 (1856), Pollock, C. B., treats the case as authority for the proposition that a host owes no duty to a guest beyond that of disclosing latent dangers known to him, and says, "the rule applies to all members of a domestic establishment — a visitor at a house . . . must take his chance with the rest."

the general conceptions of the common law. The case came up upon motion to arrest judgment on a verdict in favor of the plaintiff on the ground that the declaration was insufficient. The declaration alleged in substance a duty on the part of the master to answer for it that a safe van should be provided for the use of his servant, who was injured through its breaking down. The duty alleged was one akin to that of a common carrier or of a person who for a direct compensation provides a structure for the use of the public. Although the case is constantly cited as the earliest case laying down the doctrine that a master is not responsible to one servant for the negligence of another, in fact the overloading of the van was only one of the breaches of this duty alleged. It was also alleged that the van was out of repair, and there was a general allegation of a breach of duty to provide a safe van. The negligence of the fellow servant in overloading, if such negligence existed (as the evidence at the trial indicated), was antecedent to the plaintiff's connection with the van. It had resulted in the creation of a defect which, as Lord Abinger says, was "not alleged to have been known to the master and unknown to the servant." The whole of the opinion is directed to proving that in the absence of some contract between the master and the servant there cannot be implied from the relation any duty to insure the servant's safety so far as care on the part of those whose duty it is to provide and maintain and load a van will insure it.

It will be noticed that he speaks of the negligence of a fellow servant, a coachman or cook or chambermaid, as the same in legal effect as that of a carriage builder and butcher or an upholsterer, all plainly independent contractors. It is evident that what he is speaking of is a duty to insure the sufficiency of the van so far as care could make it safe, a duty which nothing short of performance could satisfy, the neglect of which would equally make him liable whether occurring through the fault of a servant or of an independent contractor. His opinion in reality amounts then to this: a liability for anything but personal wrongdoing on the master's part based upon his knowledge and the servant's ignorance of the defect or of some personal active misconduct on the master's part must be based upon contract. Here the servant is on the premises and has the means of knowledge. He indicates[1]

[1] In the course of the argument he says, "a passenger upon a coach pays his money in consideration of being carried, and there is an implied contract that he shall

that such a duty may arise out of actual consideration paid and exclusive control of the appliances of carriage, but he says: "The mere relation of master and servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is no doubt bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief. A servant is not bound to risk his safety in the service of his master, and may decline any service in which he reasonably expects injury to himself, and in most cases, if not all, he is just as likely to be acquainted with the probability and the extent of the liability as the master." The case is thus based entirely upon the inherent common law conception that no man is bound to take greater care of another than that other is of himself.

The master's duty is, in his opinion, evidently a personal[1] one to take care of the servant on those matters in which the servant is unable to protect himself. The duty ends where the servant's power of self-protection begins. Emphasis is laid upon the fact that there is no allegation that the servant did not know and that the master did know of the defect. If this had been so, there is no doubt that the master would have been held guilty of a breach of this personal duty. The servant, through his ignorance, could not protect himself either by extra precaution or in the last resort by refusing the duty. The master could protect him by either remedying the defect or giving him notice of its existence. In short, the case merely holds that a master as such owes no duty to his servant save that of a full disclosure of such defects as he knows of, so that the servant may protect himself, or if he please abandon the service,[2] to take care to make the business appear

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be carried safely, and he has no means of knowing how the coach is constructed or loaded."

[1] It is also evident that Lord Abinger thought that the master owed no duty save his taking such care as he personally could to keep the business free from latent defects. The idea that a master owed to his servant a positive duty to inspect the premises and appliances, the performance of which could not be delegated to a subordinate so as to escape liability, was a later growth; in fact, it appears to have been first distinctly recognized in America. In Vose *v.* R. R., 2 H. & N. 728, Pollock, C. B., says: "The statement in Patterson *v.* Wallace, 1 Macq. H. L. Cas. 748, by Lord Cranworth, that it is the master's duty to be careful that the servant is not induced to work under the notion that tackle and machinery are staunch and secure, and when in fact the master knows or ought to know that it is not so, is merely a *dictum* of the Lord Chancellor in a Scotch case, not a decision of the House of Lords."

[2] It is noticeable that this defect was one which was superadded after the servant

as it is, and so no liability to a servant who knows of the defect through which he is injured.[1] There is throughout no indication of the idea that the servant has agreed to exempt the master from liability for injury from known dangers in consideration of the compensation bargained for in the contract of service.

Nor is such a contractual basis for the master's exemption necessary; the principle, common to all purely voluntary relations, that no duty is owing save that of fair disclosure of the actual conditions under which the relation is to be created or continued is entirely adequate to relieve the master from any obligation to his servant in regard to the known or open condition of his plant or premises, whether the defect was due to the prior negligence or willful wrong of the master himself or of a fellow servant. But even a bare licensee, that least favored of voluntary relations, while of course assuming, in the absence of some conscious concealment, the risk arising from the condition of the premises, did not take upon himself the additional risk of injury from the negligent actions of the licensor or his servants in the conduct of his business thereon.[2]

Evidently some principle peculiar to this particular voluntary relation of master and servant had to be found or invented to relieve the enormous burden of answering to his servants for the care and skill of their fellow employees. No case existed in which such a liability had been enforced. It was felt that the master's liability even to strangers was a hard one, imposing as it did an enormous legal responsibility upon one who might have done all he personally could to protect his neighbors; and where the person

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had entered the master's employment. Therefore we find that this, the earliest of all cases, draws no distinction between a defective condition existing when the relation is created and one which supervenes thereafter.

[1] In Priestly *v.* Fowler, Parke, B., goes even further. He thinks that even a passenger by stagecoach would be in a similar position if he knew that the coachman was drunk or the horses skittish. He says: "I apprehend that the contract would only be to carry us as safely as could be in the condition in which the passenger knew the vehicle to be." See, however, the contrary view expressed by Grantham, J., in Osborne *v.* R. R., 23 Q. B. D. 220. This *dictum* is also opposed to the view maintained in many jurisdictions that even an expressed consent to exempt a carrier of passengers from liability for its negligences or those of its servants is void as against public policy.

[2] Gallagher *v.* Humphrey, 6 L. T. (N. S.) 684; Bennet *v.* R. R., 102 U. S. 577; De Haven *v.* Hennessey, 137 Fed. Rep. 472. Of course the negligence must be active, negligent misconduct toward the licensee while on the premises, — not mere antecedent negligence whereby the physical condition of the premises has been made unsafe.

claiming the benefit of this vicarious liability was not a stranger but one whose livelihood was derived from the master's business, who to the extent of his wages might be regarded as a joint adventurer therein, the hardship became even more striking. There was naturally a desire to limit its application, especially where if strictly applied it would throw an intolerable and almost prohibitive burden upon the development of business and manufacture. Commercial and manufacturing conditions were in a state of transition at this time (1837 to 1842). Railways and elaborate and intricate machinery were coming into use; the old conditions under which a few workmen worked with simple tools under the eye of the master were rapidly passing away. The contract of service afforded a convenient medium through which the master might be relieved from this intolerable burden. Into it was bodily read — because commercial necessity required it — an implied stipulation that the servant should assume the risks of the negligent acts of those fellow servants with whom he might expect to be associated, upon whose care his safety might be expected to depend.[1] Such a method was in accordance with the judicial

[1] In the first case raising this point, Murray *v.* R. R., 1 McMull. (S. C.) 385 (1841), the fact that the injured fireman had chosen to work under the particular engineer appears to have led the court to regard the servant as assuming a known risk of his employment, the chance of such engineer's personality. In Farwell *v.* R. R., 4 Met. (Mass.) 49 (1842), no such element existed, and the decision was based squarely on a presumption of an implied term in the contract of employment that the servant should assume among the other expectable risks that of the subsequent negligence of his fellow servant, though personally unknown to him, it being presumed that the compensation had been fixed in relation to such risks. Chief Justice Shaw's statement that the law conclusively presumes that the servant intended to bear such risks is most unsatisfying. Every legal presumption merely indicates some rule or policy of the law whereby the existence of the fact presumed becomes legally unimportant. It remains to discover what the policy of law is, which, irrespective of the consent of the servant, imposed such an assumption upon him. Chief Justice Shaw himself says in this opinion: "In considering the rights and obligations arising out of particular relations, it is competent for the courts to regard considerations of policy and general convenience, and draw from them such rules as will best promote the safety of all parties concerned. This is the basis on which implied promises are raised, being duties legally inferred from the consideration of what is best adapted to promote the benefit of all persons concerned."

An obligation so imposed by law upon a relation created by contract irrespective of the consent of the parties thereto, is in no sense a contractual obligation. It is fundamentally a law-imposed obligation, substantially a tort duty, and it is only introducing an element of confusion to speak of such obligations as originating in an implied term of contract creating the relation. That Chief Justice Shaw should give as instances of such implied contracts the extended liability of common carriers and innkeepers emphasizes this. Only nine years after this case was decided, the fallacy of regarding

tendency of the time, which was to refer if possible all obligation to the consent of the party on whom it was laid,[1] and which thus led courts to consider all duties imposed by the policy of the law on a relation created by contract as founded on some presumed fictitious term in the contract creating the relation. This exemption of the master from the operation of the maxim of *respondeat superior* was alone peculiar to the relation of master and servant;[2] the absence of any duty on his part to remedy conditions of service which the servant knew when he entered the employment, resulted from the application to this specific voluntary relation of a principle general to all voluntary associations. Unfortunately there has been a perhaps natural tendency to confuse the two things, and so to import from the one which perhaps required it a fictitious contractual basis absolutely unnecessary to the other, and to refer all the master's exemptions and duties to some presumed term of the contract of employment.[3]

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the duty of a carrier of passengers as rising from an implied term in the contract of carriage was fully exploded in the case of Marshall *v.* R. R., 11 C. B. 665.

[1] This was the prevailing tendency of the courts at that era. It appears to mark the final wave of the influence of the conception prevalent during the end of the eighteenth and beginning of the nineteenth century, which referred all power of government to the social contract, and which sought to find a basis for all legal obligations in the consent, real or fictitious, of the parties upon whom they were laid. Beginning with Marshall *v.* R. R., 11 C. B. 665, the modern tendency has been on the contrary to consider that the question as to whether an obligation is one in tort or contract depends upon whether it is imposed by the policy of the law or is created by the actual consent either expressed or necessarily implied in fact from the circumstances of the case. See Turner *v.* Stallibrass, [1898] 1 Q. B. 56, and Clark *v.* The Army and Navy Stores, [1903] 1 K. B. 155.

[2] Compare Woodley *v.* R. R., L. R. 2 Exch. 384, and Wood *v.* Lock, 147 Mass. 604, with Johnson *v.* Lindsay, [1891] A. C. 371, and Morgan *v.* Smith, 159 Mass. 570. In the first of these pairs of cases, one who accepted work under known dangerous conditions was not allowed to recover, though himself a servant not of the defendant whose premises were dangerous, but of an independent contractor; while in the latter the employer of an independent contractor was held liable to the servant of such contractor for injury received through the negligent acts of his own servants though engaged in the same piece of work, the exemption from the maxim *respondeat superior* being an incident peculiar to the relation of master and servant.

[3] See Lord Herschell in Smith *v.* Baker, [1891] A. C. 325, and Lord Cranworth in Bartonshill Colliery Co. *v.* Reid, 3 Macq. H. L. Cas. 266.

In Hutchinson *v.* R. R., L. R. 5 Exch. 343, Alderson, B., p. 350, adopts practically the reasoning of Shaw, C. J., in Farwell *v.* R. R. He says: "The servant knew when he engaged in the service that he was exposed to risk of injury not only from his own want of skill and care, but also from the want of it on the part of his fellow servants, and he must be supposed to have contracted on the terms that as between himself and master he would run this risk."

In Thomas *v.* Quartermaine, Bowen, L. J., alludes to the confusion which has arisen

Such a fiction is no more necessary as a basis for the master's duties to his servant than it has been seen to be as a basis for his exemption from liability for obvious defects in his plant. Wherever two persons for their mutual benefit[1] enter into a voluntary relation, he who has the ability to protect another who is unable to protect himself is bound to do so. The duty springs from the power of the one and the impotence of the other. The duty is common to all such voluntary relations. Lord Abinger has recognized, in Priestly *v.* Fowler, "the master's obligation to provide for the safety of the servant to the best of his judgment, information, and belief"; but as in the case of all voluntary relations, the duty is subject to the limitation that it extends only to the discovery and repair of conditions which are not obvious to the other party, — just as it was held by Willes, J., in Indermaur *v.* Dames,[2] that one who invited another upon his premises upon his own business must inspect the premises in order to discover any unusual and so unexpectable defect, since he, having the sole control of the premises, alone had the power to do so, — so it has been held that the master, since the servant is on his premises or using his plant in his (the master's) business, is bound to take care by inspection to see that the premises and plant shall not deteriorate from the condition in which they obviously were when the servant began. Here, too, the master alone has the power to make such inspection and discover such defects, the servant being absorbed in the performance of his duties. But in

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from the fact that by a contract of service the workman was deemed to have taken upon himself such risks as were visible and known. He says: "This is one way of putting such a defense, and may in many cases be sufficient, but there is another way of stating it and another principle wholly independent of contract on which a similar defense arises. The law is full of instances where duties assume a double aspect, and may be viewed concurrently as arising by implication out of a contract, or as created by some wider principle of law which happens to take effect, and to receive apt illustration in the particular instance of some particular contract. It is in most cases a barren and metaphysical inquiry to discuss whether such duties are best treated as arising by implication from the contract or from the general law outside. The Employers' Liability Act of 1880 makes precision on this point necessary, and renders it important to remember that quite apart from the relation of master and servant, and independent altogether of it, one man cannot sue another in respect of a danger or risk, not unlawful in itself, that was visible, apparent, and voluntarily encountered by the injured person."

[1] Benefit is essential if the duty is to be other than a mere duty to disclose the conditions as they are known to exist. An obligation to take affirmative action to discover the true condition is based upon some benefit to him upon whom it is laid.

[2] L. R. 1 C. P. 274.

each case, when the defect has been discovered, the owner of the premises [1] or the master [2] is bound to remedy the defect or in the alternative to give the invitee or servant notice of it.

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[*To be continued.*]

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[1] Kelly, C. B., Indermaur *v.* Dames, L. R. 2 C. P. 311.

[2] So in the Irish case of Vaughan *v.* Ry., 12 Ir. C. L. 297, a case in which the declaration set forth that the deceased was employed to work in a passage where there was a wall of which his master had absolute control, and that while engaged in the work the wall became ruinous and fell. Pigot, C. B., held that since the declaration alleged the wall became ruinous after the plaintiff was engaged in the service, the declaration was good. Upon this statement the defendants can hardly be treated as otherwise than cognizant (probably because it was their duty to inspect so as to learn the true condition of the wall) of the altered condition of the wall, and if the wall became ruinous and dangerous while the deceased was engaged in work near it, either he ought to have been made acquainted with the change which caused the new risk to his employment, or precautions ought to have been taken to secure him from the danger. See Swayze, J., Dowd *v.* R. R., 70 N. J. Law 452, 455. See, on the whole subject, Beven on Negligence, pp. 748–763.